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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 632

JAMES E. HARRIS,
Plaintiff in Error,

v.

NORFOLK SOUTHERN RAILWAY, a corporation,
Defendant in Error.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LOUIS B. FINE and HOWARD I. LEGUM
720 Law Building
Norfolk, Virginia
Counsel for Petitioner

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James E. Harris, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on June 29, 1963, and the Order of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on August 20, 1963, denying the petition for re-hearing.

OPINIONS BELOW

There was no opinion of the United States District Court. The opinion of the Court of Appeals (infra, Appendix A, pp.) is reported at 319 F.2d 493.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1963 (infra, Appendix B, p. 35). A petition for rehearing was denied August 20, 1963 (infra, Appendix C, p. 36). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

I. Whether, where the District Judge omitted to charge the jury as to the mental disorder suffered by petitioner, a new trial should be awarded limited to damages only.

II. Whether, where the District Judge refused a requested charge that the jury should award damages for the plaintiff's mental disorder if the jury found in favor of the plaintiff, and if the piece of steel, on the date of the accident, precipitated petitioner's mental disorder, and that the Railroad finds petitioner in the condition he was in at the time of the accident, a new trial should be awarded limited to damages only.

III. Whether, where the charge to the jury omitted any reference to hospital and medical bills incurred by the petitioner, although there was substantial evidence that the bills amounted to $3,468.00, a new trial should be awarded to the petitioner limited to damages only.

STATUTES INVOLVED

The statute involved is Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq.

STATEMENT

A. The Basic Facts.

James Harris, 44 years old, an illiterate Negro laborer for the Norfolk Southern Railway Company, received injuries on April 23, 1957. Harris was holding a crowbar under a wooden tie while two laborers of the railroad named James Robert Jones and Clifton A. Shamby were striking spikes with spike mauls into a rail. Jones miscalculated his swing, hitting the rail instead of the head of the spike, and a piece of the rusty rail, about the size of a halfmoon approximately ¼" to ½" in size, flew off and imbedded itself into Harris' left forearm, about 6" from the third knuckle from the end of the little finger of his left hand. Harris claimed that the two laborers had been racing to see who could drive the spike into the rail the quicker (Tr. p. 22).

Prior to the accident Harris had been working for the Norfolk Southern Railway Company for approximately thirteen years, had never complained of pain in his left arm or hand and had always been able to perform his work as a laborer (Tr. pp. 21, 394, 409).

Dr. Robert E. McAlpine, Assistant Chief Surgeon for the railroad, that day removed the foreign metal in a one and one-half hour operation in the Emergency Room of the Norfolk General Hospital, Norfolk, Virginia. X-rays were taken that day by Dr. Henry Wood, radiologist, who reported a rectangular shaped foreign body 6 x 14 millimeters in the soft tissue of the extensor surface of the left forearm 6 centimeters proximal to the wrist joint, being 1 centimeter below the skin surface, just below the level of the radius and ulna (Tr. p. 265). The radiologist was not

able to say if the trauma injured the bones in the wrist (Tr. p. 270). He also found an old fracture of the ulna which he estimated could be as old as 6 weeks to 35 years (Tr. p. 271).

In removing the piece of rail Dr. McAlpine dressed the wound, placed a drain in it, applied an extension splint, which remained on the arm until May 27, 1957 (Tr. p. 283). Dr. McAlpine saw Harris 10 times during the first month following the injury, and then monthly thereafter through the Spring and Fall of 1957. On September 6, 1957 Harris complained to Dr. McAlpine of pain in the left arm (Tr. p. 284).

Harris returned to work on June 25, 1957. After Harris had been working for about a month following the accident, he complained to his section foreman, M. H. Moses, that his arm was hurting him (Tr. p. 393).

On January 27, 1958 Harris complained to Dr. McAlpine that the piece of steel had broken the ulna bone (Tr. p. 285). That month Dr. McAlpine referred Harris to Dr. George Duncan, an orthopedic surgeon, who was of the opinion that Harris had a 10% permanent partial disability of the left hand due to weakness (Tr. p. 341). Dr. Duncan saw Harris in June of 1958 and twice in August, 1958, and felt that part of the trouble with Harris was psychosomatic (Tr. p. 343).

In August 1958, Dr. McAlpine sent Harris to Dr. James Thomson, a neuro-surgeon, who saw him one time and found no nerve injury (Tr. p. 337).

Dr. McAlpine last saw Harris on June 29, 1959 when

Harris complained he was not able to work and Dr. McAlpine thought Harris was faking (Tr. p. 291).

Dr. McAlpine was of the opinion that Harris from the accident had a 10% to 15% permanent disability of his hand resulting from the damage to the extensor tendon of the fourth and little fingers of the left hand resulting in weakness of extension (Tr. pp. 296, 297, 303).

Because of the persistent pain Harris went to his family physician, Dr. Joseph Quarles in September, 1957 (Tr. p. 142). In examining Harris pertaining to his complaint of pain in the left forearm and wrist at that time, Dr. Quarles believed that Harris had suffered a nerve injury on the little finger beside the forearm. Dr. Quarles treated Harris at various times in 1957, 1958, 1959, and in March, 1960, prescribing demerol, percobarb, Seconal, nembutal, and Percodan. As sedatives were not relieving the pain, he placed Harris in the Norfolk Community Hospital, Norfolk, Virginia, in February, 1959. There, Dr. Quarles called in Dr. W. W. Sawyer, Jr., a neurosurgeon, who on February 25, 1959 observed a 1" transverse scar along the posterior left forearm about 4" above the wrist, with swelling below the scar, atrophy of the small and ring fingers on the left hand, flexion deformity of the little finger, weakness of abduction and flexon, decreased sensation in the last two fingers (Tr. pp. 163, 164). Dr. Sawyer had Harris transferred on February 27, 1959 to DePaul Hospital where Harris was given hot soaks to his arm and large doses of Vitamin B12 to relieve the pain (Tr. p. 165). On March 6, 1959 Dr. Sawyer operated and found a transverse carpal ligament constricting the ulnar nerve (Tr. p. 168). Due to increased bleeding Dr. Sawyer had to operate a second time to control the bleeding and

thereafter Harris was discharged from DePaul Hospital on March 10, 1959 (Tr. p. 166).

Dr. Sawyer prescribed light duty for Harris when he returned to work (Tr. pp. 35, 394). The lightest duty the section foreman was able to give Harris was lubricating and sweeping out switches (Tr. p. 395). Due to the persistent aching and pain in his arm, Harris was not able to perform his duties as a laborer and has not worked since the end of June, 1959 (Tr. pp. 37, 291). At the time of the accident Harris was earning $280.00 a month (Tr. p. 37).

Harris was examined by Dr. Arthur A. Kirk, an orthopedic surgeon of Portsmouth, Virginia, on August 14, 1959 (Tr. p. 190). Thereafter Dr. Kirk performed three operations: On September 14, 1959 at Portsmouth General Hospital; on December 16, 1959 at Portsmouth General Hospital; and on April 20, 1961 at Maryview Hospital (Tr. pp. 191, 193, 197). In the first operation Dr. Kirk, feeling that Harris had arthritis at the distal end of his ulna, removed the piece of bone where Dr. Kirk felt Harris had arthritis. In the second operation Dr. Kirk fused three bones in the wrist. In the third operation Dr. Kirk fused the left wrist joint. Harris was under the continuous care of Dr. Kirk until July 3, 1962 when Dr. Kirk was of the opinion that Harris had suffered a 25% permanent partial disability of the upper left extremity as a result of the injuries received on April 23, 1957 (Tr. pp. 204, 205).

Two psychiatrists who examined Harris each considered Harris as being 100% permanently disabled from a psychiatric viewpoint, unable to perform his work as a laborer and psychotherapy would not help him (Tr. pp. 227, 244). Dr. Robert H. Thrasher, a psychiatrist in Nor-

folk, saw Harris from March 28, 1960 to July 7, 1960. Dr. Thrasher stated that Harris bordered on the delusional and paranoia (Tr. p. 225). Harris, according to Dr. Thrasher, was not a malingerer, having a strong desire to be relieved of pain (Tr. pp. 226, 229).

Dr. Thrasher definitely felt that the nervous disorder was precipitated by the injury of April 23, 1957 (Tr. p. 242).

Dr. F. G. Woodson, a psychiatrist in Norfolk, examined Harris on behalf of the railroad on February 10, 1961 (Tr. p. 247). His diagnosis was that Harris had a pronounced conversion reaction resulting in a total and permanent psychiatric disability, with Harris being unable to return to his previous type of work, and not a proper subject for psychotherapy (Tr. p. 255).

Mrs. Maggie Harris, the plaintiff's wife, mother of ten children, confirmed that there was nothing wrong with Harris' arm before the accident (Tr. p. 74). No physician had ever before treated him for a fracture or for any other injury to his arm (Tr. p. 75). Since the accident Harris complains night and day that his arm hurts him (Tr. p. 73).

On November 22, 1960 Harris was examined in Bethesda, Maryland, by Dr. Paul D. Cantor, who is a professor in the School of Medicine at Georgetown University (Tr. p. 88). From December 22, 1960 to December 31, 1960 Harris was hospitalized by Dr. Cantor at the Bethesda Hospital where tests were run in consultation with an orthopedic surgeon and a neurosurgeon (Tr. p. 90). Harris was given pain depressant medicines, anti-inflammatory

drugs, and physiotherapy treatments. Nerves in his left forearm were blocked to determine the source of the pain (Tr. p. 94). Dr. Cantor concluded that some of the pain was organic in nature and some of the pain was psychiatric in nature (Tr. pp. 92, 94). Dr. Cantor was definitely of the opinion that the pain suffered by Harris resulted from the accident on April 23, 1957 (Tr. p. 96). According to Dr. Cantor the accident required surgery to remove the metallic foreign substance following which there was a great deal of tissue response and tenderness requiring further surgery, following which there was bone necrosis which then led to amputation of the distal part of the left ulna, leaving an unstable wrist and scar tissue, with Harris developing an incapacitating psychoneurosis (Tr. p. 97). The organic pain was produced by the irritation of the scar tissue, arthritis and abnormal stresses and strains on the ligament and tendons because part of the bony support is missing (Tr. p. 101). Dr. Cantor felt that Harris was 100% permanently disabled as a result of the accident (Tr. p. 105). He did not feel that the psychiatric portion of the injury would respond to therapy (Tr. p. 106). The arthritis in the joints of the wrist, the scar tissue and the loss of bone are permanent disabilities (Tr. p. 106). Harris is not a malingerer and cannot control the pain resulting from his psychoneurosis (Tr. pp. 100, 108). Dr. Cantor stated that even if the ulna had been fractured before the 1957 accident, since it was a healed fracture, it would not necessitate the removal of the ulna bone, as a healed fracture is back to normal (Tr. p. 122). A metal splinter, depending upon the amount of force, the strength of the bone, and the axis which was struck can fracture the ulna (Tr. pp. 117, 119).

Harris also went to Dr. Bennett of Johns Hopkins Hos-

pital in Baltimore, Maryland, to get relief from his pain. Dr. Kirk sent Harris to a neurosurgeon in Roanoke, Virginia for examination.

The bills of the physicians, hospitals and for medicine from the date of the accident to the date of the trial amounted to $3,468.00.

The pay records of the railroad show that Harris was out of work from April 23, 1957 to June 25, 1957, 8 weeks at $148.00 every two weeks. Thereafter in 1957 he missed 10 days from work. In 1958 he missed 47 days from work. In 1959 up to July 2, 1959 he missed 61 days. His total loss of earnings up until the date he quit work amounted to $1,835.00. His loss of earnings from July 2, 1959 to July 19, 1962, date of trial, amounted to $12,640.00. His special expenses including medical expense and loss of earnings from date of accident to date of trial amounted to $17,944.00.

B. The Decision of the Court of Appeals. Petitioner filed a Brief and Appendix, a Reply Brief, and after the case was argued before the Court of Appeals, a Supplemental Brief. The Railroad filed a Brief and Appendix, and a Supplemental Brief and Appendix.

The Court below affirmed the District Court, with one Judge dissenting.

A Petition for Rehearing En Banc was denied.

REASONS FOR GRANTING THE WRIT

Judge Bell's dissent is a more reasonable opinion in this case, to-wit:

"The principal controversy between the parties was whether or not the plaintiff's physical and mental disabilities were caused by the accident in 1957. However 'tenuous' the basis for this may appear to this court upon review of the record, and I do not agree that it was tenuous, the plaintiff was entitled to have the issue passed upon by a jury. The majority concedes the failure of the charge properly to marshal the evidence on this issue for the jury. On this point, plaintiff's counsel objected and tendered an instruction to the court, thus bringing squarely to the court's attention the inadequacy of the charge. The fact that the issue was drawn to the jury's attention by counsels' fight to include or exclude evidence on the issue instead of excusing the inadequacy of the charge, only compounds it.

"The size of the verdict—too small if the plaintiff's physical and mental disabilities were caused or aggravated by the accident—and too large if they were not—strongly suggests that the jury did not understand the issue. Error in a charge need not be by a direct misleading of the jury; it may be, as I think it was in this instance, from a neglect and refusal to lead the jury on the chief issue. In the absence of an adequate charge, we have no right to speculate on whether or not the jury was misled. A charge which correctly gives an abstract statement of the law, but which does not apply the law to the facts of the case, is misleading and prejudicial. Cf. *Lachman* v. *Pennsylvania Greyhound Lines*, 160 F.2d 496 (4 Cir. 1947)."

The majority opinion recognizes that the charge to the jury was not proper, to-wit:

"A more difficult question arises with respect to the sufficiency of the charge on the question of damages, for the charge in that respect is far from a model of completeness.

". . . Nevertheless, it should have served as a reminder to the Court of the appropriateness of instructions which would have more adequately pointed up the principal issue at the trial, the connection, or lack of connection, between the plaintiff's physical and emotional infirmities and the injury he suffered in 1957. That issue would have been illumined had the Court marshaled the evidence for the jury, and, in that connection, referred to the well-established principle that the tort-feasor is liable for all of the damages sustained as a result of the physical injury he inflicts, though, because of some latent infirmity or pre-existing condition, the nature and extent of the damages proximately flowing from the injury were unusual or even unforeseeable at the time the injury was inflicted.

. . . The question then is whether, in the absence of some balanced enlargement of the instruction actually given, it can be said that in all likelihood the jury was misled, or that the Court's guidance was so deficient that there well may have been a miscarriage of justice.

". . . When the difference between the parties had been so clearly limited to this one principal narrow area of factual disagreement, the absence of full and complete instruction on tangential legal questions was not fatal, though, under other circumstances, their absence migh have resulted in an unfair submission."

As the jury verdict in favor of Harris has resolved

all question as to the negligence of the railroad, counsel for defendant having conceded that there was no evidence of contributory negligence, the questions on appeal are (1) whether the verdict of $15,000.00 was inadequate as a matter of law, (2) whether the court properly and fully instructed the jury as to damages, and (3) whether plaintiff's proposed instructions as to damages were properly refused by the court.

The physicians rated the disability of Harris from the organic or orthopedic standpoint from 10% to 25%. The two psychiatrists were unanimous that Harris is 100% permanently injured from a psychiatric standpoint and that he can never return to his job as a laborer and that psychiatric treatment will not be helpful.

Prior to the accident in 1957 Harris had been working continuously for the railroad for a period of approximately 13 years. During this period of time he had never complained of pain in his left arm or wrist. He was always able to perform his duties as a laborer.

Being illiterate, with only a first grade education and unable either to read or write, the psychiatrists conceding that he cannot work as a laborer from a psychiatric standpoint, Harris will not be able to obtain a job. He cannot qualify for work behind a desk, due to his limited education, nor can he do laboring work. His special expenses exceed $17,000.00, yet the jury only awarded him $15,000.00.

The evidence is without dispute that the accident in 1957 precipitated the psychiatric condition. The evidence is without dispute that Harris is not a malingerer and evinces a genuine desire to be relieved of pain. He submitted him-

self to three operations by Dr. Kirk, two operations by Dr. Sawyer and has gone to Roanoke, Virginia, Baltimore, Maryland and Bethesda, Maryland, seeking help. He was hospitalized as an inpatient six times.

Under the facts in this case the verdict as a matter of law was inadequate and a new trial should be granted restricted to damages only.

The instructions to the jury by the district judge as to damages, it is submitted, were not complete (Tr. pp. 473, 474). Although the evidence showed a loss of wages and mental anguish, the court qualified the instruction by the words "if any". There was no mention in the given instructions as to the fact that the plaintiff has a 100% permanent disability from a psychiatric standpoint that will prevent him from returning to his job as a laborer. There is no mention in the instruction as to the expenses relating to hospitals, physicians, and medicines.

Plaintiff offered Instruction P-8 which was refused by the court (Tr. p. 444), and was a complete instruction itemizing 16 elements of damages. This instruction included inconvenience suffered by Harris, medical expense, life expectancy, as well as other elements.

Instruction PX which was offered by the plaintiff and which was refused by the Court (Tr. p. 444) told the jury that the defendant railroad would be liable to the plaintiff for any mental injury resulting from the accident.

Exception was duly taken (Tr. p. 444). The railroad claimed and confused the Court that the mental disorder was not proximately caused by the accident (Tr. p. 444). In this respect we submit that the position of the railroad

was erroneous as the evidence for the plaintiff and the defendant was that the plaintiff's mental condition resulted from the accident, the evidence being without dispute that the plaintiff had no mental disorder prior to the accident.

The major element of damage in this case was the mental injury sustained by the plaintiff as a result of the accident. Yet nowhere does there appear in the charge to the jury any reference to this mental condition. Furthermore, counsel for plaintiff submitted to the Court an instruction PX pertaining to the effect of the injury upon the plaintiff's mental condition, which the Court refused, to wit:

> "The Court instructs the jury that if the piece of steel on April 23, 1957, the date of the accident, precipitated the plaintiff's mental disorder, and if the jury finds in favor of the plaintiff, the jury shall award damages for the plaintiff's mental disorder.
>
> "The defendant railroad finds the plaintiff in the condition he was in at the time of the accident.
>
> "The Court further instructs the jury that if you find in favor of the plaintiff, he is entitled to recover damages, even if you find that the piece of steel did not fracture the ulna bone."

In *Watford* v. *Morse*, 202 Va. 605, 118 S.E. 2d 681, 683, the Court said:

> "It is a general rule that one who negligently inflicts a personal injury on another is responsible for all the ill effects which, considering the condition of health in which the plaintiff was when he received the injury,

naturally and necessarily follow such injury. Hence a defendant's liability is in no way lessened or affected by reason of the fact that the injuries would not have resulted had the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by reason of the fact that he was not in good health.'" See also 5 Mich. Jur., Damages, § 48, 539; and 15 Am. Jur., Damages, §§ 80, 81, pp. 488, 489, 490.

The charge to the jury as to damages by the district Judge omitted any reference to the effect of the injury upon plaintiff's mental condition, to-wit:

"The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the plaintiff, you should determine the amount of damages suffered by the plaintiff directly and proximately in consequence of his injury, and you should find the amount of damages to be such a sum of money as will fairly, justly and adequately compensate him for his injury. In determining the amount of such damages, you may take into consideration his age, earning capacity, and the character, extent and severity of his injury, the pain, inconvenience and embarrassment, if any, that he has endured up to the present time, and the pain, inconvenience and embarrassment, and suffering, if any, that it is reasonably certain he will endure in the future; you may also take into consideration such disability, if any, as he has suffered up to the present time and such disability, if any, as it is reasonably certain he will suffer in the future therefrom; you should take into consideration

the plaintiff's mental anguish, if any, his loss of wages, if any, and you will consider the above elements, if any, so far as they have been proved by a preponderance of the evidence to have resulted from the accident in question; you will thereby determine from the evidence what sum will be fair and just compensation for the plaintiff's injury."

The charge to the jury omitted any reference to hospital bills and medical bills incurred to date, although there was substantial evidence that the hospital and medical bills amounted to $3,468.00.

Counsel for the plaintiff offered an instruction P-8 on damages which was refused by the Court, which in the 8th and 9th paragraphs thereof told the jury to consider the hospital and medical bills incurred to date.

Instruction P-8 is as follows:

"The Court instructs the jury that if you find in favor of the plaintiff James E. Harris you may, in estimating damages, consider the following:

1. The nature and extent of the injuries he sustained.
2. The physical suffering to date of trial.
3. The mental suffering to date of trial.
4. The physical suffering he will probably experience in the future.
5. The mental suffering that he will probably experience in the future.

6. The inconvenience that he has suffered to date of trial.
7. The inconvenience that he will probably experience in the future.
8. The hospital bills incurred to date.
9. Medical bills incurred to date.
10. All other medical expenses.
11. Loss of wages from date of accident to date of trial.
12. Loss of wages that he will probably lose in the future.
13. The effect of the injuries upon his health.
14. The degree that his injuries are permanent.
15. Loss of earning capacity.
16. His life expectancy.

and you shall fix such damages as will reasonably compensate the plaintiff for the injuries he has sustained not to exceed the sum of $250,000.00, the amount sued for."

It is further submitted that there is no evidence from any psychiatrist or from any physician that plaintiff's mental condition at the present time was *not* precipitated by the accident.

All of the doctors, both for the plaintiff and the defendant, agree that the plaintiff Harris is suffering from a mental condition:

1. *Dr. Woodson (employed by defendant railroad company)* page 255 of the transcript of evidence:

"I regard him as having a total and permanent psychiatric disability."

2. *Dr. Duncan (employed by the defendant railroad company)* page 353 of the transcript of the evidence:

"Q. Didn't you report to the Norfolk and Southern Railway Company, Doctor, that in your opinion he would have—You thought he was psychosomatic?"
"A. I did, sir."

3. *Dr. Taylor (employed by defendant railroad company)* page 361 of the transcript of the evidence:

"I think this probably is a matter of mind over matter."

4. *Dr. Cantor*—page 98 of the transcript of the evidence:

"Mr. Harris has developed an incapacitating 'psychoneurosis."
page 100 of the transcript of the evidence:

"Q. Is the pain which he experiences as a result of the psychoneurosis, is it deliberately induced on his part so he can turn it off and on at his pleasure?
"A. It is not."

page 105 of the transcript of the evidence:

"It is my opinion that this man is a hundred per cent disabled."

page 106 of the transcript of the evidence:

"Q. What is the reason for your believing that psychotherapy will probably not help?

"A. I have seen many cases in the past twenty years of this intensity and duration that have gone to psychotherapy and I have just not seen one respond adequately."

page 113 of the transcript of the evidence:

"Q. In arriving at your conclusions about Harris, you relied a great deal on the reports that you got from the orthopedic specialist and the neurological specialist and the other man, Dr. Grabill I think, you mentioned, did you not?

"A. I think it could be better said that they confirmed what I thought."

page 133 of the transcript of the evidence:

"My opinion would be his present condition is a result of the accident referred to, and the subsequent surgeries."

5. *Dr. Thrasher*—page 227 of the transcript of the evidence:

"From a psychiatric viewpoint he is 100 per cent disabled."

"It is my feeling that this is most likely to be a permanent thing."

page 229 of the transcript of the evidence:

> "I am very definitely of the opinion that this is not malingering in any sense at all."

page 242 of the transcript of the evidence:

> "It is my opinion that this patient is definitely suffering from a nervous disorder which insofar as I can ascertain was precipitated by the injury on the 23rd of April 1957."

Under the circumstances, how can it be said that the plaintiff has had a fair trial when the instruction as to damages by the District Judge was incomplete and made no reference to the effect of the injury upon his mental condition?

Plaintiff, James Harris, is an illiterate negro whose only job was that of a laborer and who now, from the undisputed evidence, can not work as a laborer due to his psychiatric disability.

This Court has always construed the Federal Employers Liability Act liberally. As there was no evidence of contributory negligence, it is submitted that the verdict of $15,000.00 was not realistic and that had the jury been properly charged as to damages, the verdict would have been adequate.

Harris has a life expectancy in excess of 20 years. With a permanent disabling 100% psychiatric injury preventing him from working as a laborer and not being qualified for any other work, with no evidence of any psychiatric dis-

order prior to the injection of the steel rail into his arm, with a consistent and regular work history of 13 years prior to the accident in 1957, having undergone many operations subsequent to the injury and consulted many physicians in an effort to be cured, the verdict of the jury of $15,000.00 was not realistic, did not compensate Harris adequately for his loss of earnings and medical expenses prior to trial and his loss of earnings in the future, nor did it compensate him adequately for the pain he suffered in his permanent organic and psychiatric injury.

A case arising under the Federal Employer's Liability Act, 45 U.S.C.A. Sec. 51, holding that a verdict of $8,000.00 was inadequate, is *Estabrook* v. *Butte A & P Ry. Co.*, C.A., Mont. 163 Fed. 2d 781. In that case a 40 year old man with a life expectancy of 27.45 years had been earning $206.60 per month. In loading freight he suffered a permanent coronary thrombosis. Any physical exertion caused the man, pain, and his expectancy of life had been reduced to ten years.

Other cases holding awards inadequate are *Kadair* v. *Pittsburgh Rys. Co.*, 383 Pa. 50, 117 A. 2d 712; *Wright* v. *Estep*, 194 Va. 332, 73 S.E. 2d 371; and *Glass* v. *David Pender Grocery Co., Inc.*, 174 Va. 196, 5 S.E. 2d 478.

The railroad emphasizes the organic injuries and deemphasizes the psychiatric injuries and contended that Harris failed to prove the necessary causal link between the accident and the mental disability (Tr. p. 8). The railroad ignores the fact that prior to the accident Harris had no history of emotional difficulty and that following the accident the railroad's own doctor thought that he had a psychiatric difficulty. Dr. Woodson who examined Harris

for the railroad did not say that Harris' psychiatric troubles were not causally related to the accident. Dr. Thrasher testified that the accident precipitated the difficulty. There have been numerous cases considering this problem involving Workmen's Compensation as to whether a mental or nervous condition following an injury is compensable. In *McAllister* v. *Industrial Com.*, 88 Ariz. 25, 352 P. 2d 359, where the evidence was that the injured party would not have suffered psychoneurotic symptoms had his back not been injured, the court held that an award was required to be made by the Industrial Commission.

In *Hood* v. *Tex. Indem. Ins. Co.*, 146 Tex. 522, 209 S.W. 2d 345, the court held that a neurotic condition resulting in shifting zones of anesthesia in the plaintiff's foot following an injury thereto resulted from the injuries and was compensable as it was a producing rather than the sole, cause of disability, despite the fact that settlement of the claim might result in a fairly rapid cure, the plaintiff not being a malingerer. In *Parker* v. *General Earthwork Service* (LA. App.) 103 So. 2d 573, although there was evidence of domestic troubles and sexual impotency on the part of the plaintiff who, following a back injury, was unable to work because of pain affecting his back and legs, testimony of a medical expert that the accident was a precipitating cause of the disability diagnosed as a post traumatic neurosis with conversion type reaction justified an award of compensation.

In *U. S. Fuel Co.* v. *Industrial Com.*, 313 Ill. 590, 145 N. E. 122, the testimony was that there was no reason for the workman to walk in a stooped position except such as existed in his mind. The court held that the disability was compensable whether the condition was caused by a physical

injury or a mental disorder resulting from the injury. The court held that the evidence that the employee had a definite and continuing belief that he was suffering severe pain that disabled him from any work justified a finding that he had suffered an accident causing permanent incapacity for work.

A new trial should be limited to damages only. *Southern Railway Company* v. *Neese*, 4th Cir., 216 F. 2d 772; *Thompson* v. *Camp*, 6th Cir., 167 F.2d 733.

CONCLUSION

The ruling below does not adhere to the liberal interpretation of the Federal Employer's Liability Act as set forth in the many decisions of this Court. This petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

LOUIS B. FINE and HOWARD I. LEGUM
Counsel for Petitioner
720 Law Building
Norfolk, Virginia

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8831.

James E. Harris,
Appellant,

versus

Norfolk Southern Railway, a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK. WALTER E. HOFFMAN AND TED DALTON, DISTRICT JUDGES.

(Argued March 26, 1963. Decided June 29, 1963.)

Before HAYNSWORTH and J. SPENCER BELL, Circuit Judges, and PREYER, District Judge.

Louis B. Fine (Howard I. Legum, and Fine, Fine, Legum & Schwan on brief) for Appellant, and William C.

Worthington (Worthington, White & Harper on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

This Federal Employers' Liability Act plaintiff appeals from a judgment entered upon a verdict in his favor in the amount of $15,000. On appeal, his principal contention is that the amount of the verdict was inadequate. Secondarily, he complains of the denial of a requested instruction relating to damages and of the sufficiency of the instruction actually given respecting the damages. We think the plaintiff is not entitled to the new trial he asks.

On April 23, 1957, Harris, a laborer employed by the Norfolk Southern Railway Company, was using a crowbar to nip a new tie close to the rail while two other men were driving the spikes, one on either side of the rail. Harris testified that his two fellow employees were racing to see who could first drive home his spike when the maul of one struck the side of the rail instead of the spike head. As a result of the blow, a small piece of steel in the shape of a flat half moon flew off and embedded itself in the fleshy part of the plaintiff's forearm on the posterior side at a point approximately four inches about the wrist. On the same day, the fragment of steel was removed surgically after X-rays had been taken revealing the location of the steel fragment. Those X-rays also revealed an old, healed fracture of the ulna, at a point approximately two inches above the wrist. The surgeon testified that the steel fragment had not touched the ulna bone, and all of the doctors who examined the X-rays taken on April 23, 1957, agreed that the fracture of the ulna bone was then old and fully

healed. There was medical testimony that the bone fracture occurred at least six months before April 1957 and could have occurred as much as thirty-five years earlier.

After a period of convalescence, the plaintiff returned to work for the railroad, doing heavy, manual labor.

Sometime later, however, he began to complain of pain in the area of his left wrist, hand and lower forearm. As a result of these complaints, in March 1959, almost two years after the injury, a neurosurgeon exposed the ulna nerve on the anterior side of the left wrist and forearm. He found no evidence of nerve injury or defect, but reached the conclusion that the nerve was being irritated by excessive bony growth at the point of the old fracture of the ulna. He severed some fascial bands which seemed to be compressing the nerve against the callus of the old fracture.

The neurosurgical procedure on the anterior side of the left wrist and forearm provided some temporary relief, and Harris returned to light work on the railroad. Pain in the wrist area returned, or persisted, however, and, thereafter, three separate surgical operations were performed in the area of the left wrist. There was some congenital malformation of the small bones of the wrist. There was arthritic change and distortion of the ulna bone as a result of the old fracture. Some of the wrist bones were fused and a portion of the ulna was removed. Harris, however, continued to complain of intense pain and suffering in his left wrist, hand and arm.

Finally, Harris was referred to a psychiatrist. He and another phychiatrist who examined Harris at the instance

of the defendant, agreed that much of his pain was psychoneurotic. They were of the opinion that Harris was suffering from paranoia, or a pronounced conversion reaction evidenced by hostile and unreasoned resentment based upon an unfounded assumption of mistreatment by the several doctors who had operated upon him or attended him. They were of the opinion that Harris was not a malingerer; his pain, though largely the result of the psychoneurosis, was nonetheless real to him. There was a suggestion that conclusion of this litigation might result in substantial alleviation of the pain, but there was no assurance that it would. In the meanwhile, no therapy would be helpful, and Harris, at the time of trial, because of his psychoneurosis, was completely disabled from doing any work.

The plaintiff's primary contention on appeal is plainly without merit. He says that in light of the actual expenses and loss of wages already experienced, the $15,000 verdict allowed him nothing for his pain and suffering, past or future, or for his future loss of earnings. The contention, however, assumes all of the principal issues involved in the trial. It assumes that all of the difficulties experienced by the plaintiff with his wrist and with the fractured ulna were the result of the injury on April 23, 1957 when the fragment of steel entered the fleshy part of his forearm on the posterior side. There is nothing in the general verdict of the jury to suggest that the jury found any relation between the injury in April 1957 and the later difficulties he experienced with his wrist and his personality.

At best, the evidence established but a tenuous basis for a finding that the plaintiff's physical and emotional troubles, for which he was treated in 1959 and subsequent years,

stemmed from the accident of 1957. Several doctors expressed the opinion that some, or all of them, were related to the old fracture of the ulna. Those who had been told by the plaintiff that the piece of steel fractured the ulna, expressed an opinion that all of the troubles flowed from the injury of April 1957, but they predicated their opinion of causation solely on the bone fracture. Their opinion, therefore, is meaningless, unless the fracture of the ulna actually occurred when the fragment of steel struck the plaintiff's forearm. The only testimony suggesting that the bone was broken in 1957 is that of the plaintiff, who denied having sustained any earlier injury to his forearm.

Under these circumstances, the jury would have been warranted in finding that the fracture of the ulna bone and all of the difficulties later experienced by the plaintiff with his left wrist were wholly unrelated to the injury to his forearm sustained in April 1957, while that injury, at most, was a relatively minor contributing cause of the emotional difficulties which became evident later in the plaintiff's unreasoned resentment directed toward all of the many doctors who had treated or attended him. If any other finding was permissible, the suggested finding is in accordance with the great weight of the testimony. Since the jury's verdict was general only, there is no basis for the plaintiff's assumption that the jury found as a fact that the injury of 1957 was the direct or precipitating cause of all of the physical and emotional difficulties for which he was treated in 1959 and subsequent years. Without that assumption, the jury's verdict, far from being inadequate, was liberal and generous.

A more difficult question arises with respect to the sufficiency of the charge on the question of damages, for the charge in that respect is far from a model of completeness.

The District Court's instructions to the jury as to the damages were as follows:

> "If you believe from a preponderance of the evidence that the plaintiff, James E. Harris, was injured and that his injuries resulted in whole or in part from the negligence of any employee of the Norfolk Southern Railway Company, you shall return your verdict in favor of the plaintiff against the defendant for such damages as you deem fair and just for the injuries and losses which were proven by reasonable certainty to have been sustained by reason of the accident of April 23, 1957.
>
> "The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the plaintiff, you should determine the amount of damages suffered by the plaintiff directly and proximately in consequence of his injury, and you should find the amount of damages to be such a sum of money as will fairly, justly and adequately compensate him for his injury. In determining the amount of such damages, you may take into consideration his age, earning capacity, and the character, extent and severity of his injury, the pain, inconvenience and embarrassment, if any, that he has endured up to the present time, and the pain, inconvenience and embarrassment, and suffering, if any, that it is reasonably certain he will endure in the future; you may also take into consideration such disability, if any, as he has suffered up to the present time and such disability, if any, as it is reasonably certain he will suffer in the future therefrom; you should take into consideration the plaintiff's mental

anguish, if any, his loss of wages, if any, and you will consider the above elements, if any, so far as they have been proved by a preponderance of the evidence to have resulted from the accident in question; you will thereby determine from the evidence what sum will be fair and just compensation for the plaintiff's injury."

The court refused the defendant's request for a mandatory instruction that there was insufficient proof to connect the troubles the plaintiff experienced with his wrist to the 1957 injury. It also refused a request, designated P-X, submitted by the plaintiff in the following language:

"The court instructs the jury that if the piece of steel on April 23, 1957, the date of the accident, precipitated the plaintiff's mental disorder, and if the jury finds in favor of the plaintiff, the jury shall award damages for the plaintiff's mental disorder.

"The defendant railroad takes the plaintiff in the condition he was in at the time of the accident.

"The court further instructs the jury that if you find in favor of the plaintiff, he is entitled to recover damages, even if you find that the piece of steel did not fracture the ulna bone."

The District Court properly refused the requested instruction P-X. It was incomplete and fragmentary and, if given, was calculated more to confuse than to enlighten the jury. Nevertheless, it should have served as a reminder to the Court of the appropriateness of instructions which would have more adequately pointed up the principal issue at the trial, the connection, or lack of connection, between

the plaintiff's physical and emotional infirmities and the injury he suffered in 1957. That issue would have been illumined had the Court marshaled the evidence for the jury, and, in that connection, referred to the well-established principle that the tort-feasor is liable for all of the damages sustained as a result of the physical injury he inflicts, though, because of some latent infirmity, or pre-existing condition, the nature and extent of the damages proximately flowing from the injury were unusual or even unforeseeable at the time the injury was inflicted. If such instructions were given, however, the Court, in fairness, should have gone further to clearly and unequivocally instruct the jury that they should not include their damage award to the plaintiff anything on account of the plaintiff's troubles with his wrist, if it found that those troubles were the result of congenital and traumatic malformations of the bones existing before the plaintiff was struck by the piece of steel, and the blow was not an aggravation of the pre-existing condition. The question then is whether, in the absence of some balanced enlargement of the instruction actually given, it can be said that in all likelihood the jury was misled, or that the Court's guidance was so deficient that there well may have been a miscarriage of justice.

The issue as it was developed by the testimony was not complicated. The plaintiff's effort throughout the trial was to connect the neurosurgical operation of March 6, 1959 and the three subsequent orthopedic operations, and, through them, the emotional disorder, to the entry of the piece of steel into the plaintiff's forearm in April 1957 and its surgical removal. He undertook to do this by denying any previous injury and by the submission of medical testimony that the subsequent difficulties with the wrist resulted from and were related to the fracture of the ulna bone. Through-

out the trial, the defendant strove unsuccessfully to exclude evidence of the plaintiff's physical difficulties and infirmities associated with the bone fracture. Its efforts to exclude such evidence were consistently overruled by the Court, at times in the presence of the jury. Thus, the principal issue of the case was clearly outlined, and there was nothing in the evidence to suggest that the defendant might not be fully responsible for all of the plaintiff's emotional and physical difficulties, if, in fact, they resulted from the injury of April 1957, even though the result was not immediate, and this, in turn, depended upon the factual issue as to whether or not the ulna bone was broken in 1957 by the steel fragment.

Two psychiatrists testified, one offered by the plaintiff and one offered by the defendant. The two psychiatrists were in substantial agreement as to the plaintiff's present psychiatric disability, and each related the disability directly to the surgical and medical treatments to which the plaintiff had been subjected. The defendant sought to escape liability for the psychiatric disorder only by disassociating the injury of 1957 and the fracture of the ulna bone.

When the narrow issue was thus so clearly defined by the testimony, therefore, the jury could not have been misled by a very general charge instructing them to award to the plaintiff damages "which will fairly, justly and adequately compensate him for his injury." Since the jury had witnessed the defendant's unsuccessful efforts to exclude evidence of the plaintiff's more recent medical disabilities, and since the sole important factual issue in the case was whether the break in the plaintiff's ulna bone was old and fully healed in April 1957, as the doctors who examined the X-rays testified, or whether it was a fresh break caused

by the fragment of steel as the plaintiff impliedly testified by denial of an earlier injury, the jury could hardly have supposed that the issue of the defendant's accountability for the later disabilities had been removed from its consideration. When the difference between the parties had been so clearly limited to this one principal narrow area of factual disagreement, the absence of full and complete instruction on tangential legal questions was not fatal, though, under other circumstances, their absence might have resulted in an unfair submission.

Considering the charge of the Court as a whole against the background of the factual issue as framed by the testimony, and the jury's verdict, we find no basis for a conclusion that the jury was misled, or was likely to have been misled, by the Court's charge or by the absence of references to legal questions which might have been crucial if the factual issue had been less clearly defined. Under the circumstances, we conclude the Court's submission of the case to the jury was fair and that the plaintiff's motion for a new trial was properly denied.

Affirmed.

J. SPENCER BELL, Circuit Judge, dissenting:

The principal controversy between the parties was whether or not the plaintiff's physical and mental disabilities were caused by the accident in 1957. However "tenuous" the basis for this may appear to this court upon review of the record, and I do not agree that it was tenuous, the plaintiff was entitled to have the issue passed upon by a jury. The majority concedes the failure of the charge

properly to marshal the evidence on this issue for the jury. On this point, plaintiff's counsel objected and tendered an instruction to the court, thus bringing squarely to the court's attention the inadequacy of the charge. The fact that the issue was drawn to the jury's attention by counsels' fight to include or exclude evidence on the issue instead of excusing the inadequacy of the charge, only compounds it.

The size of the verdict—too small if the plaintiff's physical and mental disabilities were caused or aggravated by the accident—and too large if they were not—strongly suggests that the jury did not understand the issue. Error in a charge need not be by a direct misleading of the jury; it may be, as I think it was in this instance, from a neglect and refusal to lead the jury on the chief issue. In the absence of an adequate charge, we have no right to speculate on whether or not the jury was misled. A charge which correctly gives an abstract statement of the law, but which does not apply the law to the facts of he case, is misleading and prejudicial. Cf. *Lachman v. Pennsylvania Greyhound Lines*, 160 F.2d 496 (4 Cir. 1947).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8831.

James E. Harris,
Appellant,

vs.

Norfolk Southern Railway, a corporation,
Appellee.

Appeal from *the United States District Court for the* Eastern *District of* Virginia.

This cause *came on to be heard on the record from the United States District Court for the* Eastern *District of* Virginia, *and was argued by counsel.*

On consideration whereof, *it is now here ordered and adjudged by this Court that the judgment of the District Court appealed from, in this cause, be, and the same is hereby,* affirmed with costs.

CLEMENT F. HAYNSWORTH, JR.
United States District Judge.

L. RICHARDSON PREYER
United States District Judge.

I dissent:

J. SPENCER BELL
United States District Judge.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed Aug. 21, 1963.

R. M. F. Williams, Jr., Clerk.

No. 8831.

James E. Harris,
Appellant.

versus

Norfolk Southern Railway, a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

ORDER

The Court having heretofore on June 29, 1963 entered its judgment and filed an opinion in the above entitled case and a petition for rehearing having been filed on July 29, 1963;

Now, Therefore, upon consideration of the petition for rehearing,

IT IS ORDERED that the petition for rehearing be, and the same hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

J. SPENCER BELL
United States Circuit Judge

L. RICHARDSON PREYER
United States District Judge

August 20, 1963.

A true copy,

Teste: (Omitted)

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963.

No. 632.

JAMES E. HARRIS,
Plaintiff in Error,

v.

NORFOLK SOUTHERN RAILWAY,
a corporation,
Defendant in Error

BRIEF IN OPPOSITION TO CERTIORARI

WORTHINGTON, WHITE & HARPER
900 Plaza One
Norfolk, Virginia
Counsel for Defendant in Error

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JAMES E. HARRIS,
Plaintiff in Error

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a corporation,
Defendant in Error

BRIEF IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

Defendant in Error (hereafter sometimes called the Railroad) agrees with preliminary statement of the case by Plaintiff in Error Harris, except for his recitation of the facts.

FACTS

The Railroad will restate the facts, inasmuch as petitioner has ignored the jury's verdict in stating the facts as to the

injuries proven in this case. The jury found that Harris' injuries were limited to a slight disability of his left arm, which was the only injury sustained on the day of the accident. The jury accepted the Norfolk Southern evidence that the other injuries were not connected with the accident. There was no believable evidence to connect up Harris' other claims of injury with the accident, and the jury verdict has settled all conflicts in the evidence. The facts will be stated in the light of the verdict of the jury, the jury verdict having been approved by the trial court and the Court of Appeals.

James E. Harris, a section hand employed by Norfolk Southern Railway Company, was assisting in the operation of driving spikes into railroad ties on April 23, 1957 (Tr. 71). He was holding a crow bar wedged under the tie to "nip" the tie closely up under the rail to be spiked. Two other laborers were driving spikes into the tie with heavy, pointed hammers or mauls. As the work proceeded, one of the mauls struck the top edge of the rail rather than the head of the spike and caused a small sliver or splinter, the size of half a dime or less. The small splinter, though driven downward by the maul, freakishly flew sideways in the air and struck Harris' left forearm on the outer or extensor surface (Tr. 266, 276). The tiny fragment barely penetrated beneath the skin of the forearm and came to rest before reaching the bone (Tr. 266, 281; Defendant's Exhibit 3). The location of the splinter was more than two inches toward the elbow from the wrist joint (Tr. 268).

After being injured, Harris was able to drive his own automobile to the doctor's office and back twice on the day of the accident (Tr. 59). He was given prompt medical care by Dr. Robert McAlpine, a competent surgeon. X-rays

were taken the same day, which positively located the splinter before it was removed and also showed a previous fracture of the ulna bone at the wrist joint (Defendant's Exhibit 3). Dr. McAlpine removed the splinter from Harris' forearm in a routine operation and his recovery was uneventful (Tr. 283). Harris returned to his old job with the railroad within a few weeks and continued doing manual work for the railroad for two years after that (Tr. 71, 395, 396). In March, 1959, he instituted this action for damages and in July, 1959, he voluntarily left the employment of Norfolk Southern and has refused to work since then (Tr. 71).

The positive opinion of the surgeon who treated Harris was that he suffered a five per cent disability as a result of the accident and no other disability (Tr. 327, 328, 291, 294, 295, 296, 297). This opinion was shared by Dr. George A. Duncan, an eminent orthopedist (Tr. 341), and another eminent orthopedist, Dr. Gervas S. Taylor, Jr. gave him no disability at all (Tr. 363).

As of the date of the accident, it was conclusively established that plaintiff had suffered a previous fracture in his left wrist area and was suffering from congenital defects in several of the wrist bones (Tr. 192, 209, 211, 215, 264, 266, 340, 341, 346, 347). These pre-existing disabilities of the wrist, which were in no way aggravated by the accident, caused four later surgical operations, three by Dr. Kirk and one by Dr. Sawyer, all of which were unrelated to the accident (Tr. 171, 172, 173, 175, 180, 186). The emotional difficulties, which arose two years later and became disability only after litigation was begun, related mainly to difficulties with (1) the wrist, rather than the forearm, (2) wrist surgery and (3) imaginary mistreat-

ment by some of the doctors, not identified by the plaintiff (Tr. 239, 240, 241, 245, 246). None of these disorders had any connection whatsoever with the accident.

ARGUMENT

I

Is the discretion of the trial judge in declining to comment on the medical evidence in a personal injury action a fit subject for review on certiorari by the Supreme Court of the United States?

The petition for certiorari, stripped of useless detail, presents only the question of whether the trial court erred in failing to summarize the medical evidence for the jury. Rule 19 of Supreme Court rules says: "A review on certiorari . . . will be granted only where there are special and important reasons therefor."

In this case, the trial judge stated to the jury (Tr. 465):

> "One thing that is given to the United States District Court is the right to comment on the evidence. I make it a policy not to indicate to the jury how I feel about the factual situations of any kind, because if we truly believe in the jury system, then we should leave the factual matters for the jury to decide."

The judge left all factual matters to the jury without objection by Harris. On conflicting evidence, the jury found for Harris in some respects, but found that he had failed to prove the Railroad liable for all the damages he claimed.

There is no "special and important" reason why the

Supreme Court of the United States should review this case after it has been reviewed by the District Court (on motion for new trial), the Court of Appeals (on briefs, oral argument and supplemental briefs) and has been considered a second time by the Court of Appeals (on petition for rehearing *en banc*). This is one of tens of thousands of damage cases tried yearly in which the litigants would surely seek review of the various incidents of trial, if the Supreme Court were able to hear them and still do justice to its duty to decide the large and important matters of national concern.

Supreme Court Rule 19 sets forth five categories of reasons influencing the Court's discretion in favor of review on certiorari. This case is in none of the five: It is an FELA case, but it does not involve the construction or scope of the statute. This is not a fit case for certiorari. *McCarthy* v. *Bruner*, 323 U.S. 673, 89 L.Ed. 547, 65 S.Ct. 126; dissent of Mr. Justice Frankfurter in *Rogers* v. *Missouri Pac. R. Co.* 352 U.S. 524, 1 L.Ed. (2d) 520, 77 S.Ct. 443.

II

Was the jury fairly instructed on the question of damages?

Railroad says that, regardless of petitioner's failure to object to the jury charge, the jury was fully instructed on the question of damages. The court's charge (Instruction 14) on this part of the case was as follows:

> "The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in

assessing damages against the plaintiff, you should determine the amount of damages suffered by the plaintiff directly and proximately in consequence of his injury, and you should find the amount of damages to be such a sum of money as will fairly, justly and adequately compensate him for his injury. In determining the amount of such damages, you may take into consideration his age, earning capacity, and the character, extent and severity of his injury, the pain, inconvenience and embarrassment, if any, that he has endured up to the present time, and the pain, inconvenience and embarrassment, and suffering, if any, that it is reasonably certain he will endure in the future; you may also take into consideration such disability, if any, as he has suffered up to the present time and such disability, if any, as it is reasonably certain he will suffer in the future therefrom; you should take into consideration the plaintiff's mental anguish, if any, his loss of wages, if any, and you will consider the above elements, if any, so far as they have been proved by a preponderance of the evidence to have resulted from the accident in question; you will thereby determine from the evidence what sum will be fair and just compensation for the plaintiff's injury."

The jury fully and fairly considered the question of plaintiff's damages. The Railroad says that the record shows that it made twenty-four separate attempts to limit the medical evidence to illness or disease connected by proof with the accident (Tr. 42, 27, 72, 77-84, 132, 170, 171, 176, 206, 228, 230, 256, 257, 258, 424, 444-446, 447, 449 and 463). These attempts included objections to the admissibility of testimony, objections to the admissibility

of exhibits, motions to strike evidence already admitted, motions for mistrial because of evidence already admitted, objection to a jury instruction (PX) which emphasized such evidence, and the offer of instructions (A, E, F and G) which would eliminate jury consideration of such evidence. The trial court exercised its discretion to leave this evidence before the jury and consistently ruled against the Railroad. Considering that more than two-thirds of the evidence was medical and the jury observed more than a dozen unsuccessful attempts by the Railroad to exclude or limit this evidence, the Railroad says that medical issues were fully submitted to the jury. It was a matter for the sound discretion of the trial judge to determine whether or not to comment on the medical evidence. In choosing not to comment, he decided not to emphasize any portion of the medical evidence in favor of the plaintiff and not to limit the jury's consideration of the medical evidence as asked for by the Railroad.

Under these circumstances instruction No. 14 (quoted above), telling the jury to "fairly, justly and adequately compensate" plaintiff for his injury, completely submitted all issues of damage to the jury. The argument of counsel to the jury was long and detailed on all the medical aspects of the evidence. The court certainly considered that the matter had been fully submitted, as shown by his remarks after the verdict. Plaintiff's counsel also considered that the case had been fully submitted, inasmuch as his motion for a new trial made no mention of insufficient instruction, but was based on the sole grounds that "damages are . . . inadequate". The Railroad says that plaintiff had a fair trial on the question of damages.

In detailing the evidence, Harris on petition for certi-

orari recites at length the testimony of various doctors as to his illness in the period of time after April 23, 1957. There is no evidence, much less preponderant evidence, that this illness was proximately caused by the tiny steel splinter. The particular doctors appellant relies on are Quarles, Sawyer, Kirk, Thrasher, Woodson and Cantor. Appellant fails to recite all the testimony of these six witnesses.

Dr. Joseph Quarles: Dr. Quarles testified that Harris concealed the important part of his medical history that the April 23, 1957, X-ray showed an old healed fracture of the wrist end of the ulna bone (Tr. 149, 150). Dr. Quarles' opinion was based on incomplete facts, and his medical treatment of Harris related to illness for which Norfolk Southern Railway Company was not responsible.

Dr. W. W. Sawyer, Jr.: Dr. Sawyer testified that Harris' nerve disorders and arm pain came from the old fracture, which the railroad did not cause (Tr. 171, 172, 173, 185); that the nerves in the forearm are remote from the site of the splinter wound; and that no nerve damage (neuroma) resulted from the accident of April 23, 1957 (Tr. 180-184).

Dr. Arthur A. Kirk: Dr. Kirk said the following:

a. ". . . exploration of the tendons of his wrist did not show any abnormality or any evidence of having been severed" (Tr. 192);

b. ". . . the piece of metal in my opinion did not cause any fracture of the forearm . . ." (Tr. 192);

c. That Harris had congenital defects in the bones of

his wrist, which made surgery necessary (Tr. 192, 209, 211);

d. That the April 23, 1957, X-rays seen by Dr. Kirk showed "an old fracture, which was apparently present before the injury" and the fracture was "at least six months old and probably several years old" (Tr. 192, 209, 215);

e. That Harris was exaggerating his complaints (Tr. 196, 214) with litigation in mind (Tr. 214); and

f. That the claims of injury other than the forearm wound were falsely recited by Harris (Tr. 211).

This was the plaintiff's own witness, Dr. Kirk, saying that all of the illness treated by him was foreign to the accident.

Dr. Robert H. Thrasher: Dr. Thrasher's opinion was specifically qualified by his statements:

a. That a settlement of the litigation might have a bearing on Harris' disability (Tr. 238);

b. That concern over his fractured and congenitally deformed wrist played a real part in the disability (Tr. 239, 240);

c. That the *primary* cause of the mental disorder was "improper medical care" (Tr. 240, 241); and

d. That the accident "precipitated" (or hastened) the nervous disorder rather than being its proximate cause (Appellant's Appdx. 29).

Dr. Thrasher's testimony did not provide the necessary causal link between the accident and the mental disability.

Dr. F. G. Woodson: Dr. Woodson failed to connect the plaintiff's disability with the accident at all. The transcript is bare of any opinion by him that Harris' mental trouble was caused by any event of April 23, 1957. Dr. Woodson's testimony, much like Thrasher's, was that Harris' improvement was linked to (1) the court action (Tr. 243); that he was partly concerned with his (2) wrist (Tr. 245); that the cause of his emotional trouble was (3) impossible to pinpoint (Tr. 246); and that the *primary* cause was upset over (4) imaginary poor medical treatment (Tr. 245, 246).

Dr. Paul Cantor: Cantor's medical opinion was based on the plaintiff's false claim that he had fractured his wrist on April 23, 1957 (Tr. 123). He testified that he relied on that history in establishing his diagnosis (Tr. 113). His opinion as to the proximate cause of the disability was expressly based on the false assumption that a fresh fracture of the left ulna occurred and was treated on April 23, 1957 (Tr. 129-133). The failure of plaintiff to introduce evidence to support the hypothesis for this opinion made this testimony inadmissible. *Stonegap Colliery Company* v. *Hamilton*, 119 Va. 271, 89 SE 305.

After reviewing the testimony of plaintiff's six chief medical witnesses, Norfolk Southern says that the link between the accident and the injuries is missing, when considering only plaintiff's witnesses. The testimony of Doctors McAlpine, Duncan, Thomas, Wood and Taylor, called by the Railroad, conclusively proves lack of causation.

III

May Harris have review of a jury instruction which was given at the trial without objection as required by F.R.C.P. Rule 51?

Plaintiff failed to object distinctly to the jury instructions as required by Fed. R.C.P. Rule 51.

Rule 51 says plainly:

> "No party may assign as error the giving or failure to give an instruction unless he *objects* thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (Emphasis added.)

The purpose of this Rule is clearly set forth in *Palmer* v. *Hoffman* (1943), 318 U.S. 109, 63 Sup. Ct. 477, 87 L.Ed. 645, wherein the court says at page 119:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where a part of the charge was correct, he may not through a general objection obtain a new trial."

Accord: *Willis* v. *Pennsylvania Railroad Company* (C.A. 4-1959), 269 F. 2d 549; *U.S.* v. *Board of Education* (C.A. 4-1958), 253 F. 2d. 760; *Doggett* v. *Atlantic Holding Corp.* (C.A. 4-1956) 239 F. 2d. 156.

Plaintiff below did not fairly call to the attention of the

trial judge the errors he now claims in the jury instruction given on damages. The record plainly shows that he failed to object to the refusal of instruction P8. He also failed to object to the giving of instruction No. 14. He now says that the jury was not allowed to consider medical expense, but he did not call this to the trial judge's attention. If he had, the Railroad would not have objected to the change in the instruction, as shown by the repeated references to 'medical expense' in instructions F and G tendered by the Railroad.

Plaintiff says that the court erred in failing to give instruction PX, but PX is not a proper instruction on several grounds:

1. There is no evidence of causal connection between the piece of steel and plaintiff's mental disorder;

2. PX is a finding instruction directing the jury to find in plaintiff's favor without reference to the evidence or a preponderance of the evidence;

3. It directs a finding in plaintiff's favor using the work 'precipitated' rather than the legal requirement of proximate cause; and

4. It singles out parts of the damages for emphasis.

The tender of instruction PX, a defective instruction, is not a sufficient calling of the trial judge's attention to the error now claimed by plaintiff (that instruction No. 14 did not submit the question of plaintiff's mental disorder to the jury). The plaintiff failed to object to instruction No. 14 and did not distinctly state to the trial judge that the question of mental disorder was withdrawn from the

jury by instruction No. 14 (for, indeed, it was not withdrawn).

CONCLUSION

The Railroad says that this is not a proper case for certiorari, having been decided rightly by both the Courts below. In no event should a new trial limited to damages only because the issue of damages is too closely connected with the details of the accident to be separated. *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1118.

WILLIAM C. WORTHINGTON
Counsel for NORFOLK SOUTHERN RAILWAY COMPANY, Defendant in Error

WORTHINGTON, WHITE & HARPER
900 Plaza One
Norfolk, Virginia
Counsel for Defendant in Error

Office Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM — 1963

No. 632

JAMES E. HARRIS,
Plaintiff in Error

versus

NORFOLK SOUTHERN RAILWAY,
A CORPORATION
Defendant in Error.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

LOUIS B. FINE AND HOWARD I. LEGUM
Law Building
Norfolk, Virginia

IN THE

Supreme Court of the United States

OCTOBER TERM — 1963

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JAMES E. HARRIS,

Plaintiff in Error

versus

NORFOLK SOUTHERN RAILWAY,

A CORPORATION

Defendant in Error.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

Your petitioner, James E. Harris, respectfully prays for a rehearing of the order entered on January 13th, 1964 denying his petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

HARD CASES SHOULD NOT MAKE BAD LAW, BUT HARD CASES DO AND SHOULD MAKE THE COURTS VIGILANT TO DISCOVER AND PURSUE A MODE BY WHICH, WITHOUT DOING VIOLENCE TO ESTABLISHED LAW AND FORMS OF PROCEDURE, THE WRONG MAY BE REDRESSED. 1

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1. Spillman, Adams & Co. v. Gilpin, 93 Va. 702.

The opinion further states:

> *"The discretion (of the court in determining whether or not it should grant a rehearing) thus exercised is, of course, a judicial discretion and one not to be exercised arbitrarily, either in granting or withholding the relief sought."*

I. Fifteen thousand ($15,000.00) Dollars for a lifetime permanent one hundred (100%) per cent mental disability.

II. Four (4) doctors — with none in disagreement — state that it is a one hundred (100%) per cent permanent mental disability.

III. Uncontradicted evidence of four (4) doctors to no doctors.

How would a jury know how to apply the facts without knowing what the law is?

The United States Court of Appeals for the Fourth Circuit, 319 Fs 2d, 493, *in its majority opinion, admitted*.

> "... the sufficiency of the charge on the question of damages, for the charge in that respect is far from a model of completeness."

The opinion further states:

"Nevertheless, it should have served as a reminder

to the court of the appropriateness of instructions which would have more adequately pointed up the principal issue at the trial, the connection, or lack of connection, between the plaintiff's physical and emotional infirmities and the injury he suffered in 1957. That issue would have been illumined had the court marshaled the evidence for the jury, and, in that connection, referred to the well-established principle that the tort-feasor is liable for all of the damages sustained as a result of the physical injury he inflicts, though, because of some latent infirmity, or pre-existing condition, the nature and extent of the damages proximately flowing from the injury were unusual or even unforeseeable at the time the injury was inflicted. If such instructions were given, however, the court, in fairness, should have gone further to clearly and unequivocally instruct the jury that they should not include their damage award to the plaintiff anything on account of the plaintiff's troubles with his wrist, if it found that those troubles were the result of congenital and traumatic malformations of the bones existing before the plaintiff was struck by the piece of steel, and the blow was not an aggravation of the pre-existing condition. The question then is whether, in the absence of some balanced enlargement of the instruction actually given, it can be said that in all likelihood the jury was misled, or that the court's guidance was so deficient that there well may have been a miscarriage of justice."

The majority further stated:

"When the difference between the parties had

been so clearly limited to this one principal narrow area of factual disagreement, *the absence of full and complete instruction on tangential legal questions was not fatal, though, under other circumstances, their absence might have resulted in an unfair submission.*" (Underlining ours)

The minority opinion by Judge J. Spencer Bell states:

"... *The majority concedes the failure of the charge properly to marshal the evidence on this issue for the jury.* On this point, plaintiff's counsel objected and tendered an instruction to the court, thus bringing squarely to the court's attention the inadequacy of the charge. The fact that the issue was drawn to the jury's attention by counsels' fight to include or exclude evidence on the issue instead of excusing the inadequacy of the charge, only compounds it."

"... Error in a charge need not be by a direct misleading of the jury; it may be, as I think it was in this instance, from a neglect and refusal to lead the jury on the chief issue. In the absence of an adequate charge, we have no right to speculate on whether or not the jury was misled. A charge which correctly gives an abstract statement of the law, but which does not apply the law to the facts of the case, is misleading and prejudical. Cf. Lachman v. Pennsylvania Greyhound Lines, 160 F. 2d 496 (4 Cir. 1947)."

The court's attention is brought to the error of the petitioner for a writ of certiorari, on Page 36, wherein it

appears that the case was decided by three District Judges. The case was heard by two Circuit Judges, the Honorable Clement F. Haynsworth, Jr. and the Honorable J. Spencer Bell, with one District Judge, the Honorable L. Richardson Preyer, and with the result that the two Circuit Judges disagreed, with one for affirming the judgment and Judge Bell dissenting, and the District Judge in favor of affirming the judgment of the District Court.

If the doctors are right, and the court below is correct in its finding that the charge was not proper, would it not be a miscarriage of justice to permit a judgment of Fifteen Thousand ($15,000.00) Dollars to stand for the lifetime one hundred (100%) per cent mental disability of Harris?

Petitioner prays that the order of this court denying his petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be reheard and vacated, and that the petition be granted.

JAMES E. HARRIS

By

LOUIS B. FINE

Of Counsel for Petitioner

HOWARD I. LEGUM

Of Counsel for Petitioner

Certificate of Counsel

The undersigned, Louis B. Fine, of counsel for petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in Rule 58, and that said petition for rehearing is not interposed for delay.

I do further certify that I mailed a copy of said petition for rehearing to Messrs. Worthington, White and Harper, 900 Plaza One, Norfolk, Virginia, on this 23rd day of January, 1964.

LOUIS B. FINE

Of Counsel for Petitioner